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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

In re J.L. et al., Persons Coming Under the
Juvenile Court Law.

ORANGE COUNTY SOCIAL SERVICES
AGENCY,

Plaintiff and Respondent,

v.

M.M. et al.,

Defendants and Appellants.

G051489

(Super. Ct. Nos. DP023506,
DP023507 & DP023508)

O P I N I O N

Appeal from an order of the Superior Court of Orange County, Andre
Manssourian, Judge. Affirmed.

Nicole Williams, under appointment by the Court of Appeal, for Defendant
and Appellant M.M.

Marissa Coffey, under appointment by the Court of Appeal, for Defendant
and Appellant F.C.

Nicholas S. Chrisos, County Counsel, Karen L. Christensen and Aurelio Torre, Deputy County Counsel, for Plaintiff and Respondent.

No appearance for the Minors.

* * *

Defendant M.M. (mother) is the mother of J.L., E.L., and J.C. (children), now ages eight and a half, seven and a half, and three, respectively. Defendant F.C. is the father of J.C. only but will be referred to as father.¹ Mother and father separately appeal from the order terminating their parental rights and freeing for adoption the three children. They each argue the juvenile court erred by failing to adopt the benefit exception under Welfare and Institutions Code section 366.26, subdivision (c)(1)(B)(i). (All further statutory references are to this code.)

Mother also contends there was insufficient evidence E.L. was adoptable, either specifically or generally. Finally, she asserts, if the finding of adoptability was erroneous, we should remand for the court to consider whether the sibling exception under section 366.26, subdivision (c)(1)(B)(v) applies. Father joins in these arguments.

We conclude none of the claims are meritorious and affirm the order.

FACTS AND PROCEDURAL HISTORY

In February 2013, the children were taken into protective custody after a friend's mother reported J.L. had been sexually abused by V.G., one of the adults with whom parents and children lived. A week before removal, J.L. had told mother about the abuse but when mother confronted V.G. in J.L.'s presence, he denied it and J.L. was unable to further explain. Mother decided the allegations were not true and took no action. J.L. reported that mother, father, and V.G.'s wife knew of the inappropriate

¹ Mother was still married to the father of J.L. and E.L; he lived in Mexico. Although his parental rights were terminated, he is not a party to this appeal. Mother stated she had been in a relationship with father for five years, and J.L. and E.L. saw him as their father. Father stated he viewed J.L. and E.L. as his own children.

touching. When police came to arrest V.G., mother repeatedly tried to block the door, resulting in her arrest for obstructing the police.

Mother later told police J.L. had told mother she had been sexually abused about five times during a two to three month period and reportedly mother herself had seen fondling on one occasion. But mother believed J.L. might have made up the claims. A month later mother again expressed doubts, noting J.L. had made untruthful statements about having finished her homework or to avoid getting reprimanded. When pressed to elaborate, mother then stated she believed J.L. but did not explain why.

Although father initially denied knowing about the abuse, he thereafter agreed J.L. had told the truth and he had failed to protect children. He explained he had not felt comfortable talking with V.G. about the abuse claims.

Plaintiff Orange County Social Services Agency (SSA) filed a petition against parents based on failure to protect, sexual abuse of J.L., and abuse of a sibling. The children were placed with their maternal grandmother (grandmother) and her longtime companion (grandfather; collectively grandparents).

At the detention hearing, the court ordered monitored visitation for two hours, three times a week. Visits generally went well. The court ordered services for parents. These included participating in a nonoffending parents program to address the sexual abuse of J.L. and taking a parenting class.

The six-month review report stated parents were attending the nonoffending parents meetings and were responsive to the concepts. They also attended the parenting classes but needed to do their homework.

During one class mother had what might have been a “psychotic episode,” where she hit and pulled on the clothing of another member of the group. Mother could not recall what had occurred, but stated she had been “going through so many things, that I’m feeling that I’m losing myself.” Even though mother was willing to be evaluated she missed the appointment. Parents also missed three counseling sessions,

necessitating a reinstatement in the program. SSA reported parents had made some progress after completing four of 10 parenting classes.

Mother was eventually diagnosed with depression and the possibility of posttraumatic stress disorder (PTSD).

J.L. had been referred to therapy. Although she was happy and spoke of school, and her brothers, friends and activities, she did not want to talk about parents. She stated she wanted to live with grandmother. A month later she reported her aunt and mother fought and it made her afraid. She also told a social worker she did not want to live with mother.

E.L. likewise said he did not want to go home because parents fought “a lot.” He explained they were also mad at some of the visits and did not speak to us. According to grandmother, who supervised the visits, sometimes parents did not interact with children. The social worker reported children were “thriving” in grandparents’ custody.

The 12-month review report showed visitation had been increased to six hours per week with father acting as the monitor. Grandmother reported she had concerns parents were not adequately caring for children during visits. Sometimes children were not fed and one time mother failed to change J.C.’s diaper.

Parents had not completed the parenting classes, still attending only four of 10. Mother stated she preferred to work to provide more Christmas presents for the children rather than attending counseling or parenting classes.

Mother reported she had slapped father in the face after he had kicked her out of the house, after which she stayed with a friend for the night. Five months after that, mother, who became quite angry with father, scratched his face with her fingernails. Mother later explained her anger was “really ‘over nothing.’” Mother was referred to an anger management class and father to a personal empowerment program. Two months

later, grandmother saw mother's face was very red, and mother explained father had hit her.

During the entire reunification period parents did not have stable housing. Both J.L. and E.L. stated they would like to be adopted by grandparents.

SSA recommended services be terminated and a permanency hearing scheduled.

The permanency hearing report stated mother missed or was late for several visits. About a month before the hearing, father missed all visits.

On more than one occasion mother told children they would soon be returned to her custody. She had to be reminded by the social worker not to say such things. But she continued to make those statements thereafter. On one occasion, in front of children, mother told grandmother she would regret what she had done to take children away from mother. J.L. told mother, "Whatever the judge says," whereupon mother replied, "No, you will return with me." J.L. repeated, "No, whatever the judge says."

At about that time J.L. reported she no longer wanted to visit with parents. She did not mind when mother failed to show up. One reason was mother's failure to bring them toys after promising to do so. E.L. remarked that he never expected her bring toys. Otherwise, when the visits occurred they generally went well.

The report noted J.L. was happy at school and her schoolwork had improved. She also enjoyed social and extracurricular activities. At school, E.L. was also improving but needed to work on reading and pay more attention in class.

E.L.'s behavioral problems remained but his therapist said he was slowly improving. According to the therapist, E.L. has had some anxiety and depression since separation from parents, which exacerbated his history of lack of attention and behavior problems, including tantrums. He had difficulty adjusting to living with grandparents. His therapist also reported E.L. was "confused by the long separation and caught in the

middle between his parents and grandparents.” An evaluation for ADHD was suggested if E.L.’s symptoms continued.

Thereafter a new therapist diagnosed E.L. with anxiety. He conducted family therapy with E.L. and grandparents. The therapist noted E.L. was very anxious when going to and coming from visits and commented on the “mixed messages” from mother, who told him he should not pay attention to grandmother and only call her ““grandma.”” The therapist was working with E.L. to deal with the confusion and anxiety. She told grandparents if parental rights are terminated, E.L.’s behavior problems could get worse before they got better but she would help them with that should the need arise.

Grandfather told SSA he believed that until E.L. was permanently placed, E.L.’s behavior would not improve. He stated mother made ““false promises,”” for example, telling children she would bring things for them and not doing so, and telling children to refrain from calling grandmother, “mama,” stating mother was their parent.

J.L. and E.L. call grandparents ““mami”” and ““papi”” and “are very attached” to them; J.C. calls them ““mama”” and ““papa.”” The children turn to grandparents for “comfort and affection.” J.L. stated she liked living with grandparents although she did miss mother. Although E.L. did not seem to understand the nuances of adoption, he also enjoyed living with grandparents. Grandparents are meeting children’s needs and are committed to adopting them. J.L.’s and E.L.’s drawings of what they consider to be family showed grandparents and three children. Some drawings were specifically for grandfather and stated, ““I love you.””

Parents still had unstable housing. One night mother appeared at grandparents’ home. She did not look well, and asked for money, explaining she was sleeping in her car. When grandfather suggested she leave father, mother stated she wanted to “but didn’t know how.” She said father threatened to take J.C. from her. When father drove up, mother left with him. She later reported to grandmother she and

father had fought that night and in the morning. Thereafter, mother denied the incident had happened, claiming grandfather had fabricated it because “he ha[d] the ‘hots for her.’” She also said grandmother was paying the social worker to express that it would be better for children to remain with grandparents.

SSA was concerned about the domestic violence in parents’ relationship, including father’s ability to protect children from mother. Parents missed three consecutive sessions for therapy intake.

Mother’s therapist reported mother had suffered trauma. She had little insight and the intellect of a teenager.

SSA found children were “likely” to be adopted based on their “characteristics[and] attributes.” (Underscoring omitted.) E.L. and J.L. both were happy living with grandparents. J.C. appeared to be bonded with grandparents, who were “very attentive to his needs.”

Grandmother previously had been married and divorced in Mexico. SSA advised she needed to obtain a copy of the final judgment, which grandmother agreed to do. Three months later she had not yet obtained the document and again stated she would do so.

Testimony at the permanency hearing was generally consistent with statements in the reports. In addition the social worker testified she had no major concerns about events at visitation. However, mother had missed several visits for different reasons. Further, visitation had to be monitored after mother began and continued telling children they would be returning home, despite being advised not to do so.

Father missed all visits during the month before the hearing. He testified he had to work and though he had asked to reschedule visits, the social worker could not accommodate his schedule. The social worker testified father had never attempted to reschedule. Father stated grandmother had cancelled more visits than he had.

The social worker testified children had a good relationship with grandparents. They were provided structure and grandmother went “above and beyond” in caring for children’s welfare, health, and safety.

According to the social worker, E.L. was in therapy for his behavior problems. He resisted following grandmother’s directions and had banged his head against the wall. He also was behind academically.

The social worker saw no legal impediment to him being adopted.

Mother testified children would be harmed if they could not see her again. They ran to hug her when she visited and told her they wanted to return home with her. J.C. called her “mommy.”

Father testified that since the children had been taken from them J.L. was less talkative and more reserved. E.L. was more anxious. Further, E.L. sometimes did not use the toilet. Lately E.L. had hit his head against a wall. Father testified he wanted the children returned to him and was doing everything he could to have that happen, including working hard six days a week.

J.C. knew him as his father and father would be hurt if J.C. never saw him again. When J.C. saw father, he hugged him and wanted to play; he called father “papa.” Father helped toilet train J.C. and taught him things such as not to fight with J.L. and E.L. He would continue to teach him how to be a good man if his parental rights were not terminated. Keeping custody of J.C. would benefit both of them because father really missed J.C. Father wanted the court to understand how much his life would be affected if he did not have his children.

After completion of testimony and argument, the court found adoption was in the children’s best interest. It found by clear and convincing evidence the children were both generally and specifically adoptable. Neither E.L.’s behavioral problems nor J.L.’s sexual abuse were bars to adoptability.

Nor had parents proved the benefit exception. Although father loved J.C. and felt he had a strong bond with him, from J.C.'s perspective the bond did not outweigh the benefits he would gain from an adoption. Likewise with mother, the bond she felt with her children, though strong, did not outweigh the permanence and stability they would gain from adoption.

DISCUSSION

1. Adoptability

Mother contends there was insufficient evidence E.L. was either generally or specifically adoptable. E.L.'s diagnosed anxiety and worsening behavior problems coupled with insufficient evidence of future required treatment, including the recommendation he be evaluated for ADHD, make him generally unadoptable. Second, she points to the lack of any evidence grandmother was divorced and therefore able to adopt. These arguments do not persuade.

At the permanency hearing the court must terminate parental rights and order the child placed for adoption if the required assessment and other evidence show "it is likely the child will be adopted." (§ 366.26, subd. (c)(1).) In reviewing a finding of adoptability under the substantial evidence test (*In re Lukas B.* (2000) 79 Cal.App.4th 1145, 1154), we must look at the record in the light most favorable to the findings and draw all inferences to support the ruling (*In re Autumn H.* (1994) 27 Cal.App.4th 567, 576).

The record supports the finding of adoptability. The fact there is a prospective adoptive parent alone is evidence of the likelihood of adoption. (*In re I.I.* (2008) 168 Cal.App.4th 857, 871.)

At the time of the hearing E.L. had been living with grandmother for two years. He has bonded with her. Grandmother is well aware of E.L.'s challenges and has been dealing with them and participating in therapy with him. She remains committed to adopting E.L. This is evidence that she, and any other prospective adoptive parent, could

cope with any future behavioral issues. (*In re. R.C.* (2008) 169 Cal.App.4th 486, 492 [despite child's challenges, adoptive parent's commitment to adoption leads to inference child's "age, physical and emotional condition and other personal attributes are not likely to dissuade individuals from adopting him"].)

In re Valerie W. (2008) 162 Cal.App.4th 1, cited by mother, is not to the contrary. In *Valerie W.* the court reversed the termination of parental rights due to insufficient evidence of adoptability. (*Id.* at p. 4.) But there the prospective adoptive parents did not know about "a serious genetic or neurological disorder" for which the child had not yet been tested. (*Id.* at p. 14.) Moreover, the agency's report was defective for failure to assess the prospective adoptive parents' eligibility and commitment to adopt. Such is not the case here.

No one denies E.L. has behavioral problems. But some of the problems are connected to and made worse by the proceedings. His therapist pointed out that E.L.'s anxiety increased when going to and returning from visits with parents. Further, his condition was made worse by the mixed messages he was receiving, when mother improperly continued to tell him he would be returning home to her in contrast to information he would be staying with grandmother.

The fact E.L. would need more counseling does not preclude adoption. His therapist agreed to work with grandmother to ease the transition after termination of parental rights and adoption. There is no evidence this would dissuade a prospective grandmother or a prospective adoptive parent.

Further, the fact E.L. had not yet been tested for ADHD is not fatal. Even assuming he was diagnosed with that condition, it is not a bar to adoption. "Nowhere in the statutes or case law is certainty of a child's future medical condition required before a court can find adoptability. [Citations.]" (*In re Helen W.* (2007) 150 Cal.App.4th 71, 79.)

Moreover, E.L. has positive characteristics. His physical health is good, he is sociable, likes being outside, playing in the park and engaging in other activities. His reading has improved and he gets good grades in school; he is nice to teachers and students as well.

Because there is evidence of E.L.'s general adoptability, we need not even discuss whether he is specifically adoptable. (*In re Carl R.* (2005) 128 Cal.App.4th 1051, 1061.) But there is sufficient evidence of that as well.

Mother bases the challenge on grandmother's lack of evidence she is divorced. But grandmother told SSA she was divorced; she need only obtain the documentation to substantiate it. And SSA saw no obstacle to her adopting. It was reasonable for the court to find specific adoptability as well.

2. Benefit Exception

Under section 366.26, subdivision (c)(1), parental rights may be terminated if there is clear and convincing evidence of adoptability. But an exception exists where a parent has "maintained regular visitation and contact with the child and the child would benefit from continuing the relationship." (§ 366.26, subd. (c)(1)(B)(i).) Parents have the burden to prove these elements. (*In re Zachary G.* (1999) 77 Cal.App.4th 799, 809.) We review the court's decision for substantial evidence. (*In re Bailey J.* (2010) 189 Cal.App.4th 1308, 1314.)

The record reflects visitation generally was appropriate. The children usually were happy to see parents, although toward the end of the reunification period, J.L. did not want to visit any more. Moreover, E.L.'s therapist noted E.L.'s anxiety increased before and after visits. Further, after services were terminated parents were less regular in their visits, for various reasons. In addition, mother did not always take advantage of the opportunity to call children.

Mother argues the court did not find her visitation was insufficient. But even assuming parents proved they regularly visited, they did not meet their burden to

prove children would benefit from staying with parents as opposed to being adopted. “A beneficial relationship is one that ‘promotes the well-being of the child to such a degree as to outweigh the well-being the child would gain in a permanent home with new, adoptive parents.’ [Citation.]” (*In re Jerome D.* (2000) 84 Cal.App.4th 1200, 1206.)

Mother argues children would benefit from staying with her because they knew she was their mother and J.L. and E.L. had lived most of their lives with her. Even J.C. had gotten to know her, hugged and kissed her during visits, and called her “mommy.” She argues the two older children told her they wanted to live with her.

Mother points to the statements by E.L.’s therapist that his behavior could get worse once parental rights were terminated and the need for long-term treatment. But E.L.’s therapist stated his behavior might get worse before it got better. The reasonable inference is that, in the event that occurs, E.L. will improve with time and therapy.

Mother also points to her parental role during visitation. But that itself is insufficient to outweigh adoption. For most of the time, visits were monitored. (*In re Casey D.* (1999) 70 Cal.App.4th 38, 51 [difficult to show exceptional circumstances outweighing benefit of adoption when parents “essentially never had custody of the child nor advanced beyond supervised visitation”].) But supervision was reinstated when mother continued to tell children they would return to live with her when she was instructed not to do so; this confused children. And it demonstrated mother was focusing on her own interest, not children’s.

Grandparents have a stable home. They have bonded to children, and J.L. and E.L. have expressed a desire for grandparents to adopt them. J.C. has lived with grandparents for almost the entirety of his young life. The children call grandparents “mami” and “papi” or “mama” and “papa.” The older children feel safe and happy with them.

The court found parents love their children, and we do not doubt they do. However, “[t]he parent must do more than demonstrate ‘frequent and loving contact[,]’

[citation] an emotional bond with the child, or that parent and child find their visits pleasant. [Citation.] Instead, the parent must show that he or she occupies a ‘parental role’ in the child’s life. [Citations.]” (*In re Derek W.* (1999) 73 Cal.App.4th 823, 827.) Parents did not make such a showing.

“A biological parent who has failed to reunify with an adoptable child may not derail an adoption merely by showing the child would derive *some* benefit from continuing a relationship maintained during periods of visitation with the parent. [Citation.] A child who has been adjudged a dependent of the juvenile court should not be deprived of an adoptive parent when the natural parent has maintained a relationship that may be beneficial to some degree, but that does not meet the child’s need for a parent. [Citation.]” (*In re Angel B.* (2002) 97 Cal.App.4th 454, 466; see *In re Jasmine D.* (2000) 78 Cal.App.4th 1339, 1350.) The court did not err when it found the benefit exception did not apply.

Because the finding of adoptability was not erroneous, we have no need to consider the sibling exception under section 366.26, subdivision (c)(1)(B)(v).

DISPOSITION

The order is affirmed.

THOMPSON, J.

WE CONCUR:

O’LEARY, P. J.

FYBEL, J.